NO. 40553-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

ROBIN TAYLOR SCHREIBER, Petitioner

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 04-1-01663-1

RESPONSE TO PERSONAL RESTRAINT PETITION

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I. FACTUAL BACKGROUND

The defendant, Robin Schreiber, was mad at his ex-wife and upset about his family. He armed himself, left a message with the ex-wife that he was armed and deputies were outside and she wouldn't have to worry about him anymore. He repeatedly aimed a rifle at officers, crawled out to his truck, got in and started it. He drove at officers but was blocked. He then turned away, sped down the street and rammed his truck into the driver's side door of a patrol car, killing Sgt. Brad Crawford. He was found guilty of murder in the second degree.

Defendant had been married to Debra Phares. (7 RP 1303). They had two children, but then divorced. (7 RP 1304). The divorce was stressful and he had issues with his children and child support. (7 RP 1305). (7RP 1308-09). The night before the incident, defendant had an "intense" discussion with his high school aged daughter, Taylor, regarding child support. (7 RP 1311; 8 RP 1545). Taylor fled the house for the night afterwards. (8 RP 1546-48).

The next morning, Kim Mortensen, the girlfriend of the defendant, found a note left by Taylor indicating that Taylor had left during the night and showed the note to the defendant. (8 RP 1548-49). Defendant became upset after reading the note. (8 RP 1549). Defendant was afraid

of losing his children to his ex-wife, that he was afraid of his wife turning his children against him, and that his children hated him because of his ex-wife. (8 RP 1552-53). He believed that his ex-wife kept coming back for more money. He just couldn't take it anymore. (8 RP 1555-56).

Mortensen later found defendant upstairs in the residence with a shotgun and a bag of ammunition. (8 RP 1558, 1560-61). She convinced him to unload the shotgun then she took it and hid it. (8 RP 1562-63). 911 was called. Mortensen recalled there was a 30-06 rifle in the master bedroom so she went back upstairs to get it. (8 RP 1565). Defendant pushed her aside to get the rifle. She fled the house. (8 RP 1566-67). As Mortensen was leaving, she saw the defendant pushing out the window screen in an upstairs bedroom facing the street. (8 RP 1572). She yelled at him that that he is a jerk and walked toward the end of their long driveway where the police were at. (8 RP 1575).

Deputies had arrived and positioned themselves in a line of trees at the end of the driveway. (3 RP 591-94). Officers saw Defendant knocking out additional window screens on upstairs windows that faced towards them. (3 RP 601; 4 RP 817). Defendant called his ex-wife telling her that he had his gun, that there were deputies at his house, and that she didn't have to worry about him anymore. (7 RP 1312).

Corporal Boynton of the Vancouver Police Department was requested to respond to the scene as a trained negotiator. (5 RP 1130).

Officers could see the defendant moving from room to room inside the house and watched him aim the scoped 30-06 rifle out of the window towards the tree line where the patrol cars and officers were. (3 RP 602, 607; 4 RP 819-20; 6 RP 1136, 1144). Deputy Boardman saw the defendant aim the rifle in his direction. (3 RP 608-09).

Defendant opened the front door of the house and stood back in the shadows looking towards where the officers had positioned themselves. (4 RP 826-27). He then crawled out of the house with the rifle in his arms. (3 RP 611). While crawling, he stopped, raised the rifle to his shoulder, and aimed towards the officers. (4 RP 827-28, 830-31; 6 RP 1146). When officers did not shoot him, he crawled to his truck on the southeast side of the house. (4 RP 834). Once at the truck, defendant stooped and used a tactical search method by raising the rifle to a firing position and sweeping it around corners as he looked behind and around each part of his truck. (4 RP 835-837; 5 RP 1009-12). He then got in, crawled into the driver's seat, sat for a time, and then started it. (4 RP 838-40).

Sgt. Brad Crawford, the victim in the case, ran to his patrol car which had been parked at the end of the defendant's driveway and drove west on 114th Street toward 124th Avenue, (4 RP 773), stopping when he

met a vehicle heading northbound on NE 124th Avenue that was occupied by Adam Wright and Mike Aulger. (8 RP 1496).

When Wright and Aulger approached the intersection, Sgt. Crawford, who had the emergency lights activated on his patrol car, stopped the Wright vehicle. (8 RP 1497-98). Sgt. Crawford told them to "stay put", (12 RP 2462), and then backed his patrol car off of the road to the west of the intersection of NE 114th Street and NE 124th Avenue. (8 RP 1508; 12 RP 2463-64).

Kyle and Jodi Robbins drove up and stopped behind Wright and Aulger. (7 RP 1449, 1468). Both Kyle and Jodi Robbins saw Sgt. Crawford's patrol car with its emergency lights on and that it was parked off of the road. (7 RP 1452-53, 1470-71, 1476, 1478-79).

Defendant drove toward the tree line where officers were. (6 RP 1151). Corporal Boynton got into his patrol car and drove up the driveway with his emergency lights activated to block the defendant's path. (5 RP 1016, 1021). Defendant turned westbound and drove through his yard. (5 RP 1017-18; 6 RP 1152). Corporal Boynton saw the defendant held up and showed him a metal object in his right hand. (5 RP 1017-18). The only object later recovered from the car matching the description Boynton saw was the rifle. (4 RP 780, 6 RP 1157-59).

Defendant drove the truck westbound through his yard and a field. (10 RP 2129; 13 RP 2593) and then down a neighboring driveway. (13 RP 2596). He turn west on NE 114th Street. (7 RP 1331; 10 RP 2135-36). He made the sharp ninety-degree turn from the gravel driveway onto NE 114th Street at 19 miles per hour without causing the truck to leave the roadway. (10 RP 2136-38). His brake lights came on in the turn. (5 RP 1024).

Defendant accelerated westbound on NE 114th Street, while being pursued by four patrol cars: All four had their blue lights on, and two had their sirens on. (7 RP 1332; 5 RP 925; 5 RP 1042-22; 3 RP 616).

Corporal Boynton was one of the pursuing officers. Boynton drove into the opposing lane of traffic and could see Crawford's car parked facing southbound off the side of the road at the "T" intersection of NE 114th Street and NE 124th Avenue. (5 RP 1042-43, 1048-49). Boynton could see Sgt. Crawford trying to shift his patrol car into gear at just prior to impact. (5 RP 1044).

As the defendant got closer to Sgt. Crawford's patrol car, he steered his truck directly into the center of Sgt. Crawford's patrol car and accelerated into it. (5 RP 1043-45; 7 RP 1455, 1466, 1473, 1477). No one saw the defendant's truck brake lights come on in an effort to stop just before impact. (3 RP 620; 5 RP 1047; 7 RP 1337-38).

The brake lights worked. (10 RP 2141). Defendant's truck was going approximately 31-40 miles per hour upon impact with Sgt. Crawford's patrol car (10 RP 2221); ripping the body from the frame of the patrol car and crushing Sgt. Crawfords seat to 7 inches wide. (10 RP 2089, 2093, 2096).

Adam Wright saw the defendant grab the steering wheel with both hands, make a "serious type look on his face", and then heard the truck accelerate into impact. (8 RP 1500-01, 1508). Mike Aulger saw the defendant grip the steering wheel with two hands, make an "angry" face, and rapidly accelerate into impact. (12 RP 2467-68). Kyle Robbins stated that he estimated that the defendant's truck was going 40 miles per hour and accelerated into the patrol car. (7 RP 1454-55, 1462, 1465). Jodi Robbins heard the defendant's truck accelerating and saw it go straight, impacting the patrol car. (7 RP 1473, 1477-78).

Other witnesses saw the defendant's driving before impact. Angie Owens was "kitty-corner" to the gravel driveway (NE 126th Avenue), saw the defendant's truck come south out of the gravel driveway and then fishtail, almost striking mailboxes, as it turned west onto NE 114th Street. (6 RP 1247). The pickup then traveled from the wrong lane, to the center of the road, and then back into his lane of travel as he went westbound on NE 114th Street. (6 RP 1247, 1262). The defendant's

truck accelerated down the road and then Ms. Owens heard a "big" crash. (6 RP 1247).

Ms. Ruth Locy saw the truck came very fast down the gravel driveway and then made a right turn almost wiping out the mailboxes on the south side of NE 114th Street. (6 RP 1268). With police cars directly behind him, the defendant's truck accelerated down NE 114th Street until he hit the police car at the corner. (6 RP 1269-73).

Immediately after the collision, officers stopped their cars and ordered defendant out of his truck and onto the ground. He was non-compliant, resulting in officers physically subduing the defendant. (5 RP 1053-54; 12 RP 2472-73). The loaded 30-06 rifle was removed from the defendant's truck and was unloaded by law enforcement. (4 RP 780-81; 6 RP 1157-59).

Sgt. Crawford was removed from the damaged patrol car and flown to hospital, (4 RP 642; 6 RP 1205), where he died from multiple blunt force injuries as a result of the collision. (3 RP 569-71).

Defendant was transported to Southwest Washington Medical Center in Vancouver, Washington, for the purposes of a blood draw. (7 RP 1415-16). Officer Capellas read the defendant the special evidence warning for blood. The defendant did not seem confused by the warning. (10 RP 2067-68). Blood was drawn. (10 RP 2068-69). The blood was

tested by the Washington State Toxicology Lab which showed that it had a blood alcohol content (BAC) of .14. The original analyst was assisted by Ann Marie Gordan, who reviewed his work and confirmed the original results. A year later, the original analyst moved and was not available. Gordan retested the sample and obtained a similar result, just a fraction lower, as is typical when retesting blood due. Due to rounding, the second result was .13. This confirmed the original result. (12 RP 2410-11).

Officer Capellas, recognized as an expert in the area of traffic collision reconstruction as well as driving, opined that any kind of evasive maneuver, to include braking, steering, or turning by the defendant would have resulted in little or no contact between the defendant's truck and the patrol car. (11 RP 2232).

Sgt. Crawford's car was mostly off of the roadway, with only one wheel on pavement according to Vancouver Police Officer Capellas, who is a certified traffic collision reconstructionist. (10 RP 2058-60, 2105-2112, 2125; 11 RP 2217-20, 2354). The observation of the witnesses and the opinion of Officer Capellas are in stark contrast to the opinions of three defense experts, who even contradicted each other, in regard to the placement of Sgt. Crawford's patrol car just prior to impact. (Sweeney: 13 RP 2637-40, 2675-82; Fries: 14 RP 2735-50; Moebes: 15 RP 2955-70).

After observing the incident surrounding the death of Sgt. Crawford, Corporal Boynton had sought psychological counseling. (1 RP 16, 20). On April 12, 2006, a pre-trial motion hearing was held where the defendant moved to review the psychological records of Vancouver Police Corporal Duane Boynton. (1 RP 15). Defense argued that they believed Corporal Boynton had been traumatized by this incident and that they should have a right to examine his psychological records to learn of any diagnosis that may impact his credibility. (1 RP 16). Defense agreed to an in-camera review of the records and indicated they would abide by the court's determination. (1 RP 17). The State and Vancouver City Attorney argued to the Court that the psychological records of Corporal Boynton are privileged and are not subject to compulsory disclosure. (1 RP 18-23). The Court reserved ruling until a later date. (1 RP 28).

On May 22, 2006, the court acknowledged that it would order the production of Corporal Boynton's psychological records for an in-camera review. (2 RP 226). The City of Vancouver advised the Court that Corporal Boynton had not authorized the City to release his treatment provider's name. (2 RP 237). Over objection that the compulsory process requirements of RCW 70.02.060 and the HIPAA regulations in 45 CFR were not followed, the Court directed that a subpoena be served on

Corporal Boynton's psychologist to compel production of the records for an in-camera review. (2 RP 231-32, 236).

The State never learned the name of the psychologist. Instead, Officer Boynton told the psychologist that he had learned the defense wanted the records. He directed the psychologist *not to provide the records. Nevertheless, and without being served with a court order, the psychologist* delivered the records to the court, which the trial judge reviewed and maintains under seal. Neither the State nor defendant has seen them.

During trial, defense again sought copies of Corporal Boynton's psychological records. (3 RP 415). The Court again confirmed it had them under seal. (3 RP 415). The Court also stated that "[t]here apparently will be no waiver of the claim of privilege." (3 RP 415). Corporal Boynton again confirmed that his rights were violated under RCW 70.02.060 and HIPAA under 45 CFR. He further asserted that the Defendant and the Court failed to comply with the requirements under those respective statues and/or regulations. (3 RP 415-16). The Court refused to hear the argument and advised that Corporal Boynton could file "a claim". (3 RP 416-17). Boynton continued to assert his rights were violated throughout trial. (5 RP 1033).

The Court allowed defense counsel to ask Corporal Boynton about the fact that he saw a psychologist, that he saw the doctor four times within one month, that Corporal Boynton was never prescribed medication as a result of any diagnosis, and that Corporal Boynton was not being treated by a doctor. (5 RP 1033-37). The Court would not permit defense to ask for the name of the doctor, nor for the specifics of the doctor's diagnosis. (5 RP 1033-37). The Court did advise the parties that it had reviewed the records and indicated that whether there even was a diagnosis was questionable. (5 RP 1038).

During cross-examination of Corporal Boynton the defense elected to further limit the inquiry to:

> DEFENSE: That was a tough night for you?
>
> BOYNTON: Yeah.
>
> DEFENSE: Still is?
>
> BOYNTON: Yeah.
>
> DEFENSE: Very traumatic?
>
> BOYNTON: Yeah.
>
> DEFENSE: And you went to counseling because of it?
>
> ...
>
> BOYNTON: The city offered a counseling program for all traumatic incidences [sic], and yes, I took advantage of that.

DEFENSE: You went on four occasions?

BOYNTON: Three or four.

DEFENSE: Thanks, Officer.

(6 RP 1127).

The jury found the defendant guilty of intentional Murder in the Second Degree. (19 RP 3451). By special verdict the jury also found that the defendant was armed with a firearm at the time of the commission of the crime of Murder in the Second Degree and that he knew the victim was a law enforcement officer performing official duties at the commission of the offense. (19 RP 3452).

II. ARGUMENT

To succeed on a personal restraint petition, petitioner must demonstrate actual prejudice stemming from a constitutional error, In Re Hews, 99 Wn.2d 80, 93, 660 P.2d 263 (1983) or "that the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice." In Re Cook, 114 wn.2d 802, 812, 792 P.2d 506 (1990).

Regardless of whether he bases his challenges on constitutional or nonconstitutional error, a petitioner must support his petition with facts or

evidence upon which his claims of unlawful restraint are based and not rely solely upon conclusory allegations. In re Cook, 114 Wn.2d at 813-14. The evidence presented must consist of more than speculation, conjecture, or inadmissible hearsay. In re Pers. Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). To obtain an evidentiary hearing, the petitioner must demonstrate that he has competent, admissible evidence to establish facts that would entitle him to relief. In re Rice, 118 Wn.2d at 886. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say but must present their affidavits or other corroborative evidence. State v. Bandura, 85 Wn. App. 87, 93, 931 P.2d 174 (*quoting* In re Rice, 118 Wn.2d at 885-86), *review denied*, 132 Wn.2d 1004 (1997). The affidavits, in turn, must contain matters to which the affiants may competently testify. Bandura, 85 Wn. App. at 93 (quoting In re Rice, 118 Wn.2d at 885-86).

As a threshold matter, it is important to note that a personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue. In re Taylor, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). A PRP is not a substitute for an appeal. "[C]ollateral review undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes

costs society the right to punish admitted offenders." In re the Pers. Restraint of Hews, 99 Wn.2d 80, 86, 660 P.2d 263 (1983). "Collateral attack" means any form of post-conviction relief other than a direct appeal. In re the Personal Restraint of Well, 133 Wn.2d 433, 441, 946 P.2d 750 (1997).

The principle underlying the rule barring successive collateral attacks is the need for judicial finality regarding claims that have already been adjudicated. In re Personal Restraint of LaLande, 30 Wn. App. 402, 405, 634 P.2d 895 (1981). Collateral attack by personal restraint petition of a criminal conviction and sentence cannot simply be a reiteration of issues finally resolved at trial and upon appellate review. Personal restraint petitions must raise new points of fact and law that were not or could not have been raised in the principal action. In re Personal Restraint of Gentry, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). The petitioner may raise new issues, but only errors of constitutional magnitude which actually prejudiced him and nonconstitutional errors which constitute a fundamental defect and inherently result in a complete miscarriage of justice. In re Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990); In re Hews, 99 Wn.2d 80, 87, 660 P.2d 263 (1983). To obtain relief with respect to either constitutional or nonconstitutional claims, the petitioner must show that he was actually and substantially prejudiced by the error. In re Cook,

supra at 810; ; In re Pers. Restraint of Markel, 154 Wn.2d 262, 267, 111 P.3d 249 (2005); In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 473, 965 P.2d 593 (1998); In re Pers. Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994); In re St. Pierre, 118 Wn.2d 321, 329, 823 P.2d 492 (1992).

As explained in In re Personal Restraint Petition of Gentry, 137 Wn.2d 378, 388-389, 972 P.2d 1250 (1999):

> In PRPs, we ordinarily will not review issues previously raised and resolved on direct review. In order to renew an issue rejected on its merits on appeal, the petitioner must show the ends of justice would be served by reexamining the issue. In re Personal Restraint Petition of Vandervlugt, 120 Wn.2d 427, 432, 842 P.2d 950 (1992); In re Personal Restraint Petition of Taylor, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). This burden can be met by showing an intervening change in the law "'or some other justification for having failed to raise a crucial point or argument in the prior application.'" Taylor, 105 Wn.2d at 688 (*quoting* Sanders v. United States, 373 U.S. 1, 16, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963)); see Vandervlugt, 120 Wn.2d at 432.
>
> We take seriously the view that a collateral attack by PRP on a criminal conviction and sentence should not simply be reiteration of issues finally resolved at trial and direct review, but rather should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant. As we have noted: "To obtain relief with respect to either constitutional or nonconstitutional claims, the petitioner must show that he was actually and substantially prejudiced by the error." In re Personal Restraint Petition of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994); In re Personal Restraint Petition of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992); In re Personal Restraint Petition of St. Pierre, 118 Wn.2d 321,

329, 823 P.2d 492 (1992); In re Personal Restraint Petition of Cook, 114 Wn.2d 802, 810, 792 P.2d 506 (1990); In re Personal Restraint Petition of Hews, 99 Wn.2d 80, 87, 660 P.2d 263 (1983).

As described below, Schreiber alleges several acts which he argues constitute ineffective assistance of appellate counsel. He then asserts that due to appellate counsel's failure to raise the issue or to argue it the way he liked constituted ineffective assistance and therefore he should be allowed to re-litigate them in this petition. That is not the case, as the failure to raise all possible non-frivolous issues on appeal is not ineffective assistance:

> Lord claims he was represented ineffectively in several respects both at the trial court level and on appeal. . . His challenge to appellate counsel, which we will consider, is simply that his attorneys did not raise all of the issues Lord now raises and that some of the issues which were raised were not argued in precisely the way Lord's present counsel argue them. Failure to raise all possible non-frivolous issues on appeal is not ineffective assistance, however. Rather, the exercise of independent judgment in deciding which issues may be the basis of a successful appeal is at the heart of the attorney's role in our legal process. Smith v. Murray, 477 U.S. 527, 536, 91 L. Ed. 2d 434, 106 S. Ct. 2661 (1986); Jones v. Barnes, 463 U.S. 745, 751-54, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983)). See also RPC 3.1 (lawyer shall not bring claim upon frivolous basis). Moreover, in order to prevail on the appellate ineffectiveness claim, Lord must show the merit of the underlying legal issues his appellate counsel failed to raise or raised improperly and then demonstrate *actual* prejudice. Kimmelman v. Morrison, 477 U.S. 365, 375, 91 L. Ed. 2d 305, 106 S. Ct. 2574 (1986). The claim of ineffective assistance on appeal thus adds nothing of substance to the

> personal restraint petition and appears only to have been made to permit Lord to renew claims that were raised in part or in another manner on direct appeal.

In re Pers. Restraint of Lord, 123 Wn.2d 296, 313-314 (1994).

To obtain relief in a personal restraint petition based on newly discovered evidence under RAP 16.4(c)(3), the defendant must satisfy the traditional five-factor test for obtaining a new trial based on newly discovered evidence. See In re Pers. Restraint of Lord, 123 Wn.2d 296, 319-20, 868 P.2d 835, cert. denied, 513 U.S. 849 (1994); State v. Harper, 64 Wn. App. 283, 291-93, 823 P.2d 1137 (1992). That is, the defendant must demonstrate that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. The absence of any one of these five factors is grounds for denial of the motion for a new trial. State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981).

For sake of readability and organization, and based on the preceding foundational arguments, the State will address issues raised by the Petition. Although the Petition breaks the issues into 17 sections, they appear to constitute the following:

A. Jury selection issues

B. hearsay related to lab analysis

C. blood alcohol issues

D. allegations the judge or a juror were sleeping

E. psychological records of a witness

F. jury instructions related to a firearm

G. aggravating Factors related to an exceptional sentence.

A. Jury Selection Issues

1. Juror Questionnaire

It was the defendant who proposed use of a written jury questionnaire[1] over the State's objection as to its length and scope.[2] Defendant's proposed questionnaire stated that answers would be "confidential" and that the questionnaires would become "part of the sealed Court file and will not be available for public inspection or use," but no motion to seal the questionnaires was ever made. With the one exception noted below,[3] the questionnaires were used only during jury selection, which occurred in open court. The State contacted the trial

[1] On May 22, 2006, in denying defendant's motion for change of venue, the trial court relied, in part, on the detailed jury questionnaire that defense counsel was proposing as a way of mitigating possible pre-trial bias of the venire. (___ RP___/CD 5/22/06 10:26:00 to 10:27:30, Appendix A).

[2] The State did not offer a questionnaire and did not seek to seal the defense questionnaire. Rather, the State objected to the length and tenor of the defense questionnaire and, ultimately, offered editorial suggestions to the trial court. (Attached to Petition. Dkt # 143).

[3] See discussion at Part 2, "Jury Interrogation."

court who advised that he has maintained the questionnaires, [4] but no one has asked for them.[5] As a consequence, neither a Bone-Club[6] analysis nor a sealing order is reflected in the record. There has been no attempt to settle the record in the present proceedings and there is no evidence that the questionnaires were unavailable to the public during or after jury selection.

The use and sealing of jury questionnaires in criminal proceedings do not implicate structural error under the public trial protections of the Sixth Amendment or article I, sections 10 and 22 of the Washington Constitution. State v. Coleman, 151 Wn. 2d 614, 624, 214 P. 3d 158 (2009). Where responses to questions posed in a questionnaire are fully discussed during *voir dire*, which occurs in open court, no closure or sealing has occurred. Id. A trial court's acquiescence in a questionnaire proposed by the defense, even one which suggests that responses may be sealed, does not constitute a decision by the trial court to seal the questionnaire from public access. See, e.g., State v. Erickson, 146 Wn. App. 200, 206, 189 P. 3d 245 (2008) (defendant's "helping shape a questionnaire before beginning *voir dire* does not indicate his desire to

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[4] The court maintains them pursuant to GR 31(j) which holds they are confidential, but that any member of the public, the parties, or their attorneys may seek permission to view them.

[5] See Declaration of the Honorable Superior Court Judge Robert Harris (ret) (Appendix B).

[6] State v. Bone-Club, 128 Wn. 2d 254, 096 P. 2d 325 (1995).

move the proceedings out of the courtroom."). Rather, a trial court's obligation to conduct a Bone-Club analysis is triggered by a motion to seal pleadings or to close proceedings. State v. Wise, 148 Wn. App. 425, 441, 200 P. 3d 266 (2009).

Assuming, *arguendo*, that the trial court's sequestration of jury questionnaires in the present case constituted a *de facto* "sealing" of the record, the proper remedy is remand for consideration of Bone-Club factors, rather than reversal of defendant's conviction. State v. Coleman, 151 Wn. App. at 624. This is because an improper sealing of jury questionnaires used to support *voir dire* in a courtroom open to the public does not constitute a structural error, i.e., one which creates "defect[s] affecting the framework with which the trial proceeds." Id., citing In re Detention of Kistenmacher, 163 Wn. 2d 166, 185, 178 P. 3d 949 (2008) (Sanders, concurring in part, dissenting in part) (*quoting* Neder v. United States, 527 U.S. 1, 8 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

In the absence of an objection and a showing of prejudice, "[a]pplying Bone-Club...to vacate the verdict of an impartial jury simply because, without objection, the trial court..." sequestered jury questionnaires, which the defendant proposed should be held in confidence, "...is inconsistent with the handling of other, arguably more serious, challenges to the integrity of the jury selection process." State v.

Wise, 148 Wn. 2d at 440. Further, even if error could be demonstrated in the trial court's handling of the questionnaires, the invited error doctrine precludes review where "a defendant affirmatively assented to the error, materially contributed to it, or benefited from it." State v. Momah, 167 Wn. 2d 140, 154, 217 P. 3d 321 (2009); State v. Cook, 137 Wn. 2d 533, 546-47, 973 P. 2d 1049 (1999).

In the present case, the trial court committed no error in helping to frame and in using defendant's proposed jury questionnaire. The trial judge was never asked to seal the questionnaires and has not done so. Thus, a Bone-Club analysis has never been applied to the documents. The defendant cannot now complain of sequestration of the questionnaires, to which he did not object and which, in fact, he expressly promoted. Defendant has never requested filing of the questionnaires and has made no showing of prejudice to him or the public on the ground that the questionnaires are, or ever have been, inaccessible.

2. Jury Interrogation

During jury selection, while the court took a recess, custody officers walked Schreiber through the hallway to the restroom. After the recess and while seating jurors in the jury box, the trial court was alerted by staff that two prospective jurors may have seen Schreiber in handcuffs as he returned the courtroom. Judge Harris promptly advised Schreiber,

his attorney and the prosecutor that he wanted to speak to the jurors briefly. No members of the public were in attendance at the time.[7] The trial judge directly asked if Schreiber wanted to be present. Schreiber waived his presence and allowed the court to speak to the two jurors momentarily and in private.[8] With the jury panel in the courtroom and the two jurors held back in the jury room, the trial court and counsel went into chambers.

Contrary to Schreiber's assertions in the Petition, the entire proceeding was recorded. In recorded proceedings, the judge brought the two jurors separately into chambers. The first juror was asked if she saw anything in the hallway during the recess. She said no, and was released **[to the jury room]**. The trial court questioned the first juror for 44 seconds.[9] The second juror was brought in and was asked if she saw Schreiber. She responded that she had seen him in handcuffs in the hallway. The trial court questioned this juror regarding her observations of the defendant in restraints for 1 minute and 28 seconds.[10] [11]

Defendant's trial counsel then engaged the second juror in a colloquy relating to a response in her juror questionnaire relating to

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[7] Declaration of the Honorable Superior Court Judge Robert Harris (ret) (Appendix B).
[8] RP (Excerpt) Trial, June 1, 2006 – 13:44:18 to 13:55:12, page2-3, (Appendix C).
[9] (RP (Excerpt) June 1, 2006 -13:48:16 to 13:49:00, page 4, Appendix C).
[10] (RP (Excerpt) June 1, 2006 -13:49:10 to 13: 51:04 , page 5-7, Appendix C).
[11] For length of time, see declaration of Jennifer Casey (Appendix D).

pretrial publicity. The juror acknowledged that she had been exposed to newspaper accounts of the incident, but that she had formed no judgment in the matter. The juror was sent back to the **[jury room]**, defense counsel then moved to excuse her for cause and the court agreed.[12]

The court's decision to conduct the limited inquiry about the potential contamination of the jury pool was done with the defendant's concurrence. Defendant's presence was waived. The Court's inquiry was limited to determining whether either of the jurors may have seen the defendant in restraints. Counsel for the parties were given the opportunity to question the two jurors on the subject. When the second juror acknowledged having seen the defendant in handcuffs, it was defense counsel who expanded his inquiry to include the juror's questionnaire responses and successfully moved to exclude her for cause. The entire chambers conference took less than 7 minutes including time to walk from the courtroom into chambers and return and was fully recorded.

It is firmly established that under the Sixth Amendment and under article I, sections 10 and 22 of the Washington Constitution, a defendant entitled to an open, public trial, including *voir dire*. State v. Strode, 167 Wn. 2d 222, 226, 217 P. 3d 310 (2009); State v. Brightman, 155 Wn. 2d

[12] (RP (Excerpt) June 1, 2006 -13: : to 13:53:00, page 8, Appendix C).

506, 122 P. 3d 150 (2005); In re Personal Restraint of Orange, 152 Wn. 2d 795, 100 P. 3d 291 (2004). According to our Supreme Court,

> The public trial right protected by both our state and federal constitutions is designed to "ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." Brightman, 155 Wn. 2d at 514 (*citing* Peterson v. Williams, 85 F. 3d 39, 43 (2d Cir. 1996) (*citing* Waller v. Georgia, 467 U.S. 39, 46-47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984))). . . While the right to a public trial is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances. *Easterling,* 157 Wn. 2d at 174-75.

Strode, 167 Wn. 2d at 226[13].

It is equally well established that, under the Sixth and Fourteenth Amendments and under article I, sections 3 and 22 of the Washington Constitution, a defendant is entitled to appear at trial free of shackles and other restraints. State v. Finch, 137 Wn. 2d 792, 842, 975 P. 2d 967

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[13] To protect the right to an open, public trial, a trial court contemplating closure "must perform a weighing test consisting of five criteria, set forth in State v. Bone-Club:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
> 4. The court must weigh the competing interests of the proponent of closure and the public.
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

128 Wn. 2d 254, 258-59, 906 P. 2d 325 (1995) (citations omitted); Federated Publications, Inc. v. Kurtz, 94 Wn. 2d 51, 62-65, 615 P. 2d 440 (1980).

(1999); State v. Hartzog, 96 Wn. 2d 383, 635 P. 2d 694 (1981). Our Supreme Court has recognized that the appearance at trial of a defendant in restraints undercuts the presumption of innocence, prejudices the jury against him, and impairs his ability to assist in his defense. Finch, 137 Wn. 2d at 844-45. With respect to jury contamination, the Court has noted:

> Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial. Estelle, 425 U.S. at 506; Elledge v. Dugger, 283 F. 2d 1439, 1451 (11th Cir. 1987); United States v. Ferguson, 758 F. 2d 843, 854 (2d Cir. 1985). The Supreme Court has stated that use of shackles and prison clothes are *"inherently prejudicial"* because they are "unmistakable indications of the need to separate a defendant from the community at large." Holbrook, 475 U.S. at 568-69 (emphasis added).
>
> When the court allows a defendant to be brought before the jury in restraints the "jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers." Williams, 18 Wash. at 51; Kennedy, 487 F.2d at 106.

137 Wn. 2d at 845.

3. No Closure Occurred

Nothing in Strode, Brightman, Orange or Bone-Club has been, or should be, construed as limiting the power of a trial judge to control his or her courtroom consistent with the ends of justice. State v. Gregory, 158 Wn. 2d 759, 816, 147 P. 3d 1201 (2006); State v. Pacheco, 107 Wn.2d 59,

67. 726 P.2d 981 (1986). In Gregory, the trial court, with permission of defense counsel, directed the defendant's aunt to leave the courtroom during the testimony of the defendant's grandmother after the judge observed the aunt apparently prompting the witness. In Pacheco, the defense in a robbery trial sought to call a "look alike" witness who had been contacted by the police based on the suspect description but who had been shown to have been in another state at the time of the robbery. The trial court refused to allow the witness to testify or to sit in the courtroom during the trial due to the prospect of confusing the jury. In neither case did the trial court undertake a public trial analysis akin to that required by Bone-Club. In both cases, the Supreme Court found that the actions of the trial court were consistent with the trial judge's discretion. See also United States v. Ivester, 316 F. 3d 955, 959 (9th Cir. 2003).

In Ivester, the trial judge, along with counsel for the parties, met with juror in chambers after the juror expressed concern with courtroom security given intimidating appearance of certain spectators. On appeal, defendant argued that the exclusion of the public from the chambers conference addressing courtroom security violated his right under the Sixth Amendment. The Court of Appeals noted that the right to a public trial does not extend to every moment of a trial. 316 F. 3d at 959; United States v. Norris, 780 F. 2d 1207, 1210 (5th Cir. 1986) ("Non-public

exchanges between counsel and the court on such technical legal issues and routine administrative problems do not hinder the objectives which the Court in *Waller* observed were fostered by public trials"). The Court concluded that the trial court's chambers discussion regarding the juror's concern security in the courtroom did not impair the values advanced by the right to a public trial. 316 F. 3d 960, *citing* Peterson v. Williams, 85 F. 3d at 43 and Waller v. Georgia, 467 U.S. at 46-47, Rather, the discussion with juror related to an "administrative jury problem" which did not infect witness testimony or counsels' arguments to the jury and did not implicate the right to a public trial. Ivester, 316 F. 3d at 960.

Where a defendant's right to a public trial conflicts with his right to an impartial jury, the Washington Supreme Court has recognized the need to strike a balance that harmonizes the those important rights. State v. Momah, 167 Wn. 2d at, 152-53; Federated Publications, Inc. v. Kurtz, 94 Wn. 2d at 61. In Momah, jurors were questioned in chambers on three agreed topics, including pretrial publicity. On appeal, the defendant challenged the closed *voir dire* as violating his right to public trial. The Court observed,

> On the one hand, Momah had a right to have openness where the public and jurors could hear every part of the proceedings, ensuring the fairness of his trial process. On the other, Momah had a right to an impartial jury, wherein no juror's prejudice or prior knowledge would compromise

> the fairness of Momah's trial process. One right privileges openness, while the other may necessitate closure.
>
> As we have stated in instances where article I, sections 10 and 22 were in conflict: we must harmonize the right to a public trial with the right to an impartial jury.

167 Wn. 2d at 153. "To achieve the proper balance," the Court held, "we construe those rights in light of the central aim of a criminal proceeding: to try the accused fairly." Id.

In the present case, the trial court acted promptly and within his inherent authority to control proceedings and to protect the jury in a manner consistent with the ends of justice. Alerted that two prospective jurors may have observed the defendant in handcuffs, the court correctly discerned an imminent threat to the defendant's fair trial rights. The trial court promptly sought to identify and isolate the two potentially contaminated jurors and to prevent tainting of the entire panel. His questions to the jurors in chambers were brief, narrowly tailored, direct and to the point, addressing no other subject than the jurors' possible observation of the defendant during the recess. There is no evidence that public trial interests fostered by article I, section 10 were impaired by the trial court's conduct and, in fact, the record shows that fair trial interests fostered article I, section 22 were advanced. The balance was properly struck and the defendant was tried fairly. Thus, no closure of the

courtroom of the type regulated by the Sixth Amendment and by article I, sections 10 and 22 occurred.

4. If A Partial Closure Occurred, It Was de Minimus

Our Supreme Court has recognized that its decisions employing the "closure standard for both sections 10 and 22 cases are similar to the analysis applied under the Sixth Amendment and the United States Supreme Court decision in Waller v. Georgia..." Momah, 167 Wn. 2d at 149, *citing* Waller, 467 U.S. at 47; *see also* Presley v. Georgia, ___ U. S. ___ , 130 S.Ct. 721, 175 L.Ed. 2d 675 (2010). In Waller, the trial court closed a week-long pretrial suppression hearing over the objection of the accused. The United States Supreme Court determined that the Sixth Amendment right to a public trial extended to pretrial suppression hearings. It further held that "['t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" 467 U.S. at 45, *quoting* Press-Enterprise. Co. v. Superior Court of California, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The Court extended the First Amendment closure standards from Press-Enterprise to Sixth Amendment claims, namely, that (i) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (ii) the closure must be no broader than necessary to protect

that interest, (iii) the trial court must consider reasonable alternatives to closing the proceeding, and (iv) it must make findings adequate to support the closure. Id. at 48.

While the Court in Waller held that a defendant need not prove specific prejudice in order to obtain relief under the Sixth Amendment, it did not order a new trial. Instead, holding that "the remedy should be appropriate to the violation," the Court directed that the matter be returned to the trial court for a new, open suppression hearing. According to the Court, "If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest." Id. at 50.

Assuming, for purposes of argument only, that the trial court's action in the present case was improper, the record shows the brief chambers colloquy with the two jurors was *de minimus* and too trivial to rise to the level of a constitutional violation. Based on Waller, a substantial line of cases has developed in which courts have held that not every unjustified closure, no matter how trivial, will implicate the right to a public trial. Gibbons v. Savage, 555 F. 3d 112, 119-20 (2d Cir. 2009); United States v. Perry, 479 F. 3d 885, 889-91 (D.C. Cir. 2007); Carson v. Fischer, 421 F. 3d 83, 92 (2d Cir. 2005); Braun v. Powell, 227 F. 3d 908, 918-19 (7th Cir. 2000); Peterson v. Williams, 85 F. 3d 39, 42-44; United

States v. Sherlock, 962 F. 2d 1349, 1356-59 (9th Cir. 1992); People v. Woodward, 4 Cal. 4th 376, 384-86 (1992); People v. Bui, 183 Cal. App. 4th, 675, 107 Cal. Rptr. 3d 585 (2010); State v. Venable, 411 N.J. Super. 458, 463-67, 986 A. 2d 743 (2010).

Washington appellate courts have likewise recognized that *de minimus*, partial closures of trial proceedings, which are brief or inadvertent, do not constitute a denial of the right to public trial. State v. Gregory, 158 Wn. 2d at 816; State v. Lomor, 154 Wn. App. 386, 392-93, 224 P. 3d 857 (2010); State v. Russell, 141 Wn. App. 733, 737-41 (2007). Contrary to petitioner's assertion, State v. Strode did not reject a *de minimus* exception to the right to a public trial. There, the Supreme Court held that the in chambers *voir dire* of no less than 11 prospective jurors was neither "brief nor inadvertent." 167 Wn. 2d at 230; *See also* State v. Easterling, 157 Wn. 2d 167, 180, 137 P. 2d 825 (2006). In Easterling, the Court found that an unexplained full closure of joint trial to accommodate a codefendant's motion for severance was unjustified. While noting that "a majority of this court has never found a public trial right violation to be de minimus," the Court observed, "Even if we were to indicate a tolerance for so called 'trivial closures,' the closure here could not be placed in that category because it was deliberately ordered and was neither ministerial in nature nor trivial in result." 157 Wn. 2d at 180-81. The application of this

important, pragmatic exception in the appropriate case remains unresolved.[14]

The leading case on the application of a *de minimus* exception to the Waller/Bone-Club standards is Peterson v. Williams, 85 Wn. 2d 39 (2d Cir. 1996). In that case, trial proceedings had been closed during the testimony of an undercover police office and inadvertently remained closed during the defense case while the defendant was testifying. The Second Circuit Court of Appeals held that the closure of the courtroom was too trivial to amount to a violation of the right to a public trial where it was inadvertent, brief and where the affected testimony was fully covered in closing arguments of counsel. Finding that the closure was unjustified, the Court of Appeals nevertheless determined that it "was too trivial to amount to a violation of the [Sixth] Amendment." Id. at 42. The Court distinguished harmless error analysis:

> A triviality standard, properly understood, does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer "prejudice" or "specific injury." It is, in other words, very different from a harmless error inquiry. It looks, rather, to whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant -- whether

[14] In *dicta*, the Easterling lead and concurring opinions suggested that the language of article I, section 10 might be read to preclude application of a *de minimus* exception to the right to a public trial in Washington. 157 Wn. 2d at 180 note 12, 185. It is respectfully submitted that resort to a state-based right to a public trial should be fully briefed and its impact fully explored in an appropriate case. Easterling, which involved a significant closure, was not such a case.

> otherwise innocent or guilty -- of the protections conferred by the Sixth Amendment.

Id. The Court also determined that the values identified in Waller as being advanced by the public trial guarantee, namely, (1) to ensure a fair trial, (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) to encourage witnesses to come forward; and (4) to discourage perjury, were not impaired by the brief closure of the courtroom during the defendant's testimony. Id. at 43, *citing* Waller, 467 U.S. at 46-47.

The Peterson rationale has been applied to brief partial closures of trial by various courts that were intentional as well as those that were inadvertent. Carson v. Fischer, 421 F. 3d 83, 92 (2d Cir. 2005)(exclusion of defendant's mother from courtroom during informant's testimony); Braun v. Powell, 227 F. 3d at 918 (exclusion of venire member after jury selected); United States v. Ivester, 316 F. 3d at 960 (chambers colloquy regarding juror's security concerns); People v. Woodward, 4 Cal. 4th at 384-86 (court permitted bailiff to post sign during closing arguments, "Trial in Progress – Do Not Enter"); State v. Venable, 411 N.J. Super. at 463-67 (exclusion of victim's and defendant's families during *voir dire*); State v. Gregory, 158 Wn. 2d at 816 (exclusion of spectator – defendant's aunt – for prompting witness); State v. Lomor, 154 Wn. App. at 392-93

(exclusion of defendant's three year old child); State v. Russell, 141 Wn. App. at 737-41 (prohibiting photographs of testifying juvenile witnesses).

In Presley v. Georgia, the United States Supreme Court explicitly applied the Sixth Amendment right to a public trial to *voir dire*. Pressley followed Waller, including its observation that,

> While the accused does have a right to insist that the *voir dire* of the jurors be public, there are exceptions to this general rule. "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information."

130 S. Ct. at 734, *quoting* Waller, 467 U.S. at 45.

The summary, *per curiam* opinion in Presley did not purport to limit Waller, cite Peterson, or even discuss the *de minimus* exception to the right of a public trial. There is no indication that the Presley Court intended to broaden the scope of the right to a public trial or to abandon the substantial line of cases developed of two and a half decades, which had construed Waller to permit a *de minimus* exception. See, e.g., People v. Bui, 183 Cal. App. 4th at 682. This line of cases recognizes that there are rare instances when a partial, brief but unjustified closure of a trial that does not impair the values advanced by the right to a public trial and that is limited in scope and duration simply does not rise to the level of a violation of that right. In this respect, the *de minimus* exception serves the

same end as the remedy which was imposed in Waller, namely, avoidance of "a windfall for the defendant." Waller, 467 U.S. at 50.

The *de minimus* exception has particular appeal where, as here, the trial court is confronted with conduct or an event which poses an immediate threat to a defendant's right to a fair trial. Where contamination of the entire venire is at hand, a trial courts obligation to confirm its source and contain the contamination is immediate and emergent. If mitigation of the threat involves a brief, partial – albeit unjustified - closure of proceedings that advances the defendant's right to fair trial and does not impair the values of his right to a public trial, the *de minimus* exception supports the obvious conclusion that no constitutional violation occurred. A *per se* rule of reversal, which sweeps away well-founded jury verdicts on the basis of a *de minimus* or trivial trial closure where clearly no constitutional rights were impaired, sweeps too far.

5. If Error Occurred, It Was Invited

It is clear from the record in the present case that the trial court's colloquies with the two errant jurors was within his administrative authority and was limited to protecting the defendant's right to a fair trial. His questions were strictly limited to ascertaining whether either juror had seen the defendant in handcuffs and did not address any substantive

response of either juror to their jury questionnaires. It was only defendant's counsel who extended questioning to matters contained in the questionnaire by addressing the second juror's responses to pretrial publicity questions posed in the questionnaire. From the second juror's combined responses to the trial court and defense counsel in chambers, defendant's counsel successfully challenged the juror for cause.

As noted above, the doctrine of invited error is premised on the view that a party should be prohibited "from setting up an error at trial and then complaining of it on appeal." State v. Henderson, 114 Wn. 2d 867, 870, 792 P.2d 514 (1990), *citing* State v. Boyer, 91 Wn.2d 342, 344-45, 588 P.2d 1151 (1979). The invited error doctrine applies to errors of constitutional magnitude. State v. McLloyd, 87 Wn. App. 66, 70, 939 P. 2d 1255 (1997), *affirmed sub nom*, State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999); *See also* State v. Momah, supra. In Momah, the Supreme Court distinguished between defendants who fail to object to a closure of a public trial and defendants who "affirmatively advocate for closure, argue for the expansion of the closure, and benefit from it." 167 Wn. 2d at 154. In the present case, it was defendant's counsel who expanded the chambers colloquy to matters contained in the second juror's responses to her jury questionnaire, thereby materially contributing to the closure of *voir dire* regarding pretrial publicity that should have been

discussed in open court. And it was the defendant who benefited from the error, when his counsel successfully challenged the juror for cause. Having induced the error, defendant should not now be permitted to complain about it and this Court should decline to review its merits. State v. Henderson, 114 Wn. 2d at 870.

6. Exclusion of Public

Schreiber alleges that the public was excluded from the courtroom during jury selection, yet he fails to obtain the record of the proceeding which reveals the same to have occurred. This is because the actual video and record demonstrates his claim is false.

The proceedings were video recorded. The video record demonstrates that the jury selection started with spectators in the nearly completely empty courtroom. The video reflects a member of the defendant's family sitting in the front row of the courtroom. Video Record 5/31/06, 9:40 – to 9:45 am, Appendix E. After the jury was brought in, members of the public are still sitting in the front row behind Schreiber, with empty seats in the front row. Additionally, the rear of the courtroom had empty rows as which is evident by counting the number of jurors. Video Record 5/31/06. 09:57.46. Appendix F. An examination of the video recordings from the remaining 2 days of jury selection reveals

the courtroom was mostly empty of spectators other than Defendant's family. In essence, the allegation by Mr. Schreiber is false and belied by the court recordings of the proceedings.

In assessing the defendant's credibility as to the facts in his affidavit, it is helpful to recall that presenting an unqualified statement as true, which is not true, is deemed the equivalent of presenting a false statement. See RCW 9A.72.080. Thus, the remaining assertions in the affidavit should be discounted.

7. Defendant fails to identify any private conversation between court personnel and a juror regarding fitness to serve.

Defendant alleges that at some point in the trial, the court ordered a bailiff to speak to a juror about the juror's fitness to serve. Defendant has the trial record, yet fails to identify when this occurred. He provides no support for the allegation such as to support an evidentiary hearing on this point. As the burden of proof is on the defendant, he bears the burden of identifying what he refers to, and to demonstrate prejudice, which he fails.

B. Blood Alcohol Issues

1. Hearsay related to lab analysis

During trial, the defense wished to prove the blood level was higher rather than lower. The blood was originally tested by an analyst,

with confirmation by Laboratory Manager Ann Gordon, and the results were .14 grams of alcohol per 100 ml of blood. The original analyst left the lab and could not be located. The blood vial was therefore retested more than a year later by Ms. Gordon and determined to be .13 grams of alcohol per 100 ml of blood. She explained the testing process and explained that the results she found confirmed the higher test results of the original analyst. (12 RP 2411).

As the defense sought to prove the higher level, there was no objection to the testimony regarding the higher blood alcohol level. In deed, the defense used the higher level throughout its presentation of the defense. For example, Dr. Larson testified extensively basing his assertions that the defendant had a higher blood alcohol level at the time of the incident based on the earlier .14 level. (14 RP 2819 et. seq.). Similarly, the second defense expert, Dr. Julian based a substantial portion of his testimony on the .14 result. (16 RP 3084 et. seq.) That same .14 blood level is exactly the hearsay that the defense now asserts should have been excluded.

Dr. Julian, the lead defense expert in the case *agreed* that the results from a hospital blood draw and that found by the Washington State Patrol Laboratory result "matched exactly" what he would have predicted, again, confirming the accuracy of the lab test and also Ann Marie

Gordon's testimony which he attacks elsewhere in his petition. (16 RP 3804).

Defense presents no argument as to why failing to argue the hearsay objection at trial and on appeal constituted ineffective assistance of counsel. As indicated previously, the testimony was beneficial to the defendant, was sought and used by the defendant in his case, and there was no likelihood that challenging the issue on appeal would have resulted in a reversal of the conviction, thus, under the holding of In re Pers. Restraint of Lord, 123 Wn.2d 296, 313-314, 868 P.2d 835 (1994), the appellate counsel was not ineffective for failing to raise the issue.

2. Impeachment of Lab Manager

As to issues with the lab, Defendant takes the unusual step of attempting to smear a witness, Ann Marie Gordon, but points to *no* error in her testimony, no facts which suggest there was *any* problem with her analysis, and no evidence to suggest that her testimony was inaccurate in any way. Nor does he point to any error in the blood test results, which, of course he couldn't as his own expert agreed with the result and based his testimony on the *accuracy* of the result by Ms. Gordon.

The defense experts, Dr. Larson and Dr. Julian affirmed Ms. Gordon's testimony in virtually every respect. For example, Dr. Larson

used the .14 blood alcohol level found to base his entire testimony on in an effort to prove that Schreiber's blood alcohol was up to a .18 to .19 at the time of the incident, which therefore prevented him from forming intent to commit the crime. (RP Volume 14 pp 2818, et. seq.).

As to other issues with the lab, Schreiber appears to argue that there were issues with Ms. Gordon's testimony because she incorrectly signed affidavits attesting to the results of tests of simulator solutions in breath testing instruments. The issue is that she signed certificates indicating that simulator solutions were tested properly when she didn't personally conduct the test. She signed them believing that she could sign as the supervisor of the others, much as she could sign as a custodian of records. She was wrong, and resigned because of it, but this happened well after trial.

The defendant's claim that problems with the laboratory or Ms. Gordon's testimony affected the trial are, as indicated disputed by their own experts who agreed with and used the labs work as the basis of their testimony and opinions, but even if not, defendant is not entitled to relief based upon "newly discovered evidence" as a he is not entitled to relieve unless he establishes:

> that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have

> been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. The absence of any one of the five factors is grounds for the denial of a new" proceeding. In re Pers. Restraint of Brown, 143 Wn.2d 431, 453, 21 P.3d 687 (2001) (quoting State v. Williams, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981)). A petitioner is not entitled to a new trial based upon "'newly discovered evidence'" when that evidence is "'merely cumulative or impeaching.'" Brown, 143 Wn.2d at 453.

In re Pers. Restraint of Stenson, 150 Wn.2d 207, 217 (2003).

Stenson, is particularly helpful as the case involves allegations that a forensic expert for the State was later found to have testified in other cases as to things which were not scientifically sound and further provided information against the crime laboratory. The Supreme Court found these were impeachment issues, which could not be raised in a personal restraint petition.

In the present case, aside from failing to make a showing that the result of the trial "probably would have been different," the information is, at best, impeachment evidence of Ms. Gordon and therefore not subject to a challenge via a personal restraint petition.

C. Allegations a Juror and Judge Were Sleeping

1. Sleeping Judge

The Defendant alleges that at some point in the trial, the judge closed his or her eyes. He characterizes the trial judge as "sleeping." Yet,

his able trial counsel does not so indicate in his affidavit[15], nor does he present argument that there was *any* objection, ruling, argument, evidence or other matter which were affected by any alleged sleeping.

The defendant bears the burden of proof both as to error and as to harm from that error, yet he presents no argument about any erroneous rulings, any errors in admission or exclusion of evidence which harmed him.

Jimmy Hummel was tried and convicted of murder in Minnesota. He appealed and his conviction was affirmed. Later, he filed a habeas corpus proceeding where he claimed that the judge was sleeping during trial. In the habeas petition in Hummel v. State, 617 N.W.2d 561 (Minn. 2000), the court noted that at no time, did he present any evidence to support the proposition that the court missed any rulings, made errors in the evidence, argument, or any other manner that affected his trial. His petition was therefore denied.

> [H]e has not explained how . . . the sleeping judge, if indeed the judge was sleeping, prejudiced his case. As a result, this allegation fails to support appellant's ineffective assistance claim, which requires him to allege facts that show a reasonable probability that but for the alleged error the outcome of his murder trial would have been different. The Eighth Circuit Court of Appeals addressed a similar ineffective assistance case involving an allegedly sleeping

[15] The proceedings were video recorded. Had the judge been sleeping, the State submits it would have been reflected on the recordings. Defendant fails to identify such in the record, leaving the State to speculate when and where this supposedly occurred.

> judge. See Martin v. United States, 1993 U.S. App. LEXIS 18014, No. 93-2054, 1993 WL 265072, at *2 (8th Cir. July 20, 1993). The court stated that the petitioner did "not specify any trial error that occurred as a result of the judge's alleged sleeping during parts of his jury trial," and therefore the petitioner had "not shown how he was prejudiced by counsel's failure to raise this issue on appeal." Id. Likewise, we find that appellant failed to specify how the allegedly sleeping judge prejudiced the outcome of his trial.
>
> Further weighing against appellant is the fact that he and his family knew of the alleged sleeping the moment it occurred, yet he did not file his petition for post-conviction relief until nine years after the trial. Petitioner offers no explanation or excuse for his delay. Cf. Black, 560 N.W.2d at 85. As each year passes, it becomes more difficult to address a claim like appellant's. Witnesses, if they are still available, have fading memories. In this case, the judge that appellant complains of has since retired. For all these reasons, we conclude that the post-conviction court did not abuse its discretion when it did not grant appellant an evidentiary hearing based on this allegation.

Hummel v. State, 617 N.W.2d 561, 564-565 (Minn. 2000).

Defendant's petition further asserts that, if Judge Harris were asleep, he would be entitled to a new trial. He bases this on Gomez v. United States, 490 US 858, 109 S. Ct. 2237, 104 L.Ed.2d. 923 (1989), however, even a cursory reading of that case reveals that the case is inapposite. That case has to do with a federal magistrate trying a case for which he had no legal authority to do. The Supreme Court held that because the magistrate had no authority to conduct the trial, it was a nullity.

In the present petition, the *only* evidence put forward that Judge Harris was sleeping is a one sentence claim from the Defendant, in his declaration, where such declaration is, as demonstrated previously, subject to question. He provides no affidavits or declarations from *any* other witness to support such a claim and he identifies no prejudice from the alleged sleeping. Indeed the clerk of the court and the Judge himself indicate that the Judge was alert actively participating throughout the trial.[16]

Here, Judge Harris had full authority to conduct the criminal trial and, *even if sleeping,* the defendant has not identified or alleged any harm to his case and fails to demonstrate that the outcome of the case would "probably" be different. He is not entitled to relief.

2. Sleeping Juror

Whether a juror was so inattentive that the defendant is prejudiced "is a matter addressed to the trial court's discretion. The court of appeals will only review it for abuse of that discretion. Unless counsel objects to a juror's inattentiveness during trial, the error is waived." State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986); Casey v. Williams, 47 Wn.2d 255, 257, 287 P.2d 343 (1955).

[16] See Declaration of the Honorable Robert Harris (Appendix B) and Declaration of Sharon Ferguson, Deputy Clerk, (Appendix G).

Other states reach the same conclusion. In Habeas Corpus proceedings out of Illinois, the petitioner claimed a juror was sleeping. The court held that the defendant waives any claim to the juror sleeping by failing to bring it to the attention of the court:

> The purpose of the doctrine of waiver is "to bring alleged errors to the attention of the trial judge and allow that judge an opportunity to correct them, to give the reviewing court the benefit of the judgment and comments of the court below, and to prevent unlimited litigation and unnecessary review of matters which could better be corrected in the court below." People v. Dunn, 160 Ill. App. 3d 11, 15, 513 N.E.2d 113, 115, 111 Ill. Dec. 867 (1987). Had defendant brought the sleeping jurors to the court's attention during the trial, it could have been easily detected and addressed. Because defendant failed to alert the court to the sleeping jurors, she deprived the court of the opportunity to address the problem. Illinois courts have held that the waiver rule is particularly appropriate when an objection could have easily cured the problem during the trial. See People v. Spencer, 347 Ill. App. 3d 483, 486-87, 807 N.E.2d 1228, 1231, 283 Ill. Dec. 387 (2004) (applying waiver when on appeal a defendant argued insufficient foundation for expert testimony, but failed to object at trial).
>
> * * *
>
> How can a trial judge ever dispute a defendant's post trial affidavit that a juror was sleeping unless the defendant brings the sleeping to the judge's attention at the time it occurs? Further, "the atmosphere of the courtroom[] cannot be reproduced in the record," so Illinois courts traditionally yield to the trial judge's singular position of assessing and determining the impact of improper conduct. Green v. University of Chicago Hospitals & Clinics, 258 Ill. App. 3d 536, 541-42, 631 N.E.2d 271, 275-76, 197 Ill. Dec. 268 (1994). If we allow a defendant to ignore sleeping jurors during the trial, but then argue the ill effects of their

> sleeping after the jury returns a verdict against them in what the trial judge determined to be a fair trial, we open the door for any convicted defendant who will swear, and/or get a relative to swear, that the jurors were sleeping.

People v. Grenko, 356 Ill. App. 3d 532, 535-536, 825 N.E.2d 1222 (2005)).

As in Grenko, while we don't have the brother asserting the juror was sleeping, no one else asserts a juror was sleeping either. Had there been a sleeping juror, defendant should have raised it at the time, but didn't and therefore waived any claim to being prejudiced. [17]

D. Psychological records of a witness

Officer Boynton was involved in the pursuit from the residence to the collision sight. He observed the defendant ram his truck into Sgt. Crawford. Subsequently, he participated in a counseling session with an unknown psychologist. His rights under federal and state law were violated by the trial court allowing the defense attorney to issue a subpoena to the psychologist without complying with the notice requirements of RCW 70.02.060 and the HIPAA regulations in 45 CFR Officer Boynton learned the subpoena had been issued and told his doctor not to comply with it. The stated purpose of the subpoena was to

[17] See attached Declaration of the Honorable Robert Harris (Appendix B).

determine the diagnosis the counselor had made as to the officer's mental state. (1 RP 16).

The doctor was never served with the subpoena, but brought his file and delivered it to Judge Harris. Judge Harris reviewed the file and determined there was nothing in it which would be admissible at trial. Judge Harris did, however, allow Defendant to cross examine the officer about the fact that he sought counseling, about how many times he saw the counselor and about the subject of the counseling.

Defendant appealed the trial court's decision to keep the counseling records sealed. On direct appeal, the appellate court did not find error. A personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require re-litigation of that issue. In re Taylor, 105 Wn.2d 683, 688, 717 P.2d 755 (1986).

Here the Defendant makes no effort to suggest *why* the issue should be re-litigated in a PRP. Rather, the Defendant attempts to recast the issue as a confrontation clause issue, yet not only doesn't provide any analyses as to how the exclusion of irrelevant, privileged evidence, which was obtained in violation of statutes, somehow violates the confrontation clause. At best, the defendant asks this court to speculate that the privileged materials, which the trial court found to be irrelevant, contained

impeachment evidence. This doesn't meet the requirements for relief through a PRP as discussed *supra.*

In this case, the evidence was obtained improperly but even after the court obtained the records, the reports remained privileged. RCW 5.60.060(6)(a) and RCW 18.83.110.

Although cast as a Confrontation Clause issue, even the discovery of privileged records is neither automatic nor absolute. Medical or hospital records that contain communications from a patient to a physician are privileged. State v. Mines, 35 Wn. App. 932, 937-938, 671 P.2d 273 (1983). The privilege is not absolute. Before even allowing discovery of health care records in a criminal case, the court must engage in a careful balancing of the benefits of the privilege against the public interest in disclosure of the facts contained therein. State v. Smith, 84 Wn. App. 813, 820, 929 P.2d 1191 (1997). [18] The scope of discovery of these privileged records is a matter within the sound discretion of the trial court. Mines, 35 Wn. App. at 938.

An in-camera review is a proper mechanism for the trial court to determine whether discovery of privileged records is warranted. Mines,

[18] The State notes that the witness, Office Boynton, objected to the defense acquiring the records in the first place. Among the reasons was there had been *no showing* by the Defendant that the records were necessary or that there had been a balancing of his rights with those of the defendant. The court was provided the records in violation of state and federal law when the treatment provider, having heard about the proceedings brought them to the court and gave them to the judge.

35 Wn. App. at 938-939. However, more then a bare request for medical records is needed to warrant an in-camera review. A criminal defendant must make a particularized showing that the records are likely to contain evidence material to the defense. State v. Kalakosky, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993); State v. Diemel, 81 Wn.2d 464, 914 P.2d 779 (1996).

In the present case, the defense never made a particularized showing that the records were likely to produce admissible evidence nor did he make a showing of particularized need for the records, thus, the court never should have had looked at the records. Regardless, in this PRP, the defendant, having the heavy burden of proof, fails to even aver to *any* evidence as would probably lead to a different trial result and thus, for that reason alone, the petition should be denied.

Even if the defense made a showing that there was something in the records which could be potentially helpful to the defense, this still doesn't mean the defendant could actually use the evidence at trial, and again, there would not be grounds for a new trial.

It has long been the rule in the State of Washington that a trial court retains broad discretion regarding the admission or exclusion of evidence. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). Appellate courts do not reverse a trial court's ruling on the scope of cross-

examination absent a manifest abuse of discretion. State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984).

This is not inconsistent with the other firmly established rule that wide latitude is afforded defendants in criminal trials to explore fundamental elements such as motive, bias, and credibility of the State's key witnesses. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). The trial court did an in-camera review of the documents and determined that the privileged matter could only be addressed in a very limited fashion. A criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense. Washington v. Texas, 388 U.S. 14, 16, 23, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967). *See generally* E. Cleary, *McCormick on Evidence* § 185 (2d ed. 1972 & Supp. 1978).

In his PRP, the Defendant fails to suggest the trial court abused its discretion regarding the report. An abuse of discretion occurs only when the trial court bases its decision on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The State submits that there has been no showing that the trial court abused its discretion or based any decisions limiting the cross-examination of the witness.

Thus, not only has the defendant failed to show why the matter should be revisited, he fails to show why the evidence is admissible, he

fails to show that they probably would have changed the outcome of the trial and he is not entitled to relief.

Jury instructions related to a firearm

1. Defense Fails to Demonstrate Trial and Appellate Counsel were Ineffective Regarding Firearm Instructions.

The Defendant alleges both his trial counsel and the appellate counsel were ineffective regarding the jury instruction defining the firearm enhancement.

While claiming in this petition that the defendant objected to the instruction, the defendant fails to indicate that the instruction was *proposed* by the defendant, it's the current pattern instruction and it's been upheld by the appellate courts.

The court's instruction 33 regarding the firearm allegation was defense proposed instruction 41. See Appendix H. This is the pattern WPIC instruction approved for use in Washington. The only objection posited by the defendant was that the court not give the instruction for all counts, but made no objection to the wording of the instruction itself.

The defendant provides no analysis to suggest his trial and appellate attorney were actually ineffective. Bare assertions are

insufficient to support a Personal Restraint Petition. In Re Cook, 114 wn.2d 802, 812 (1990). Moreover, an appellate attorney is not ineffective by failing to raise all possible issues. To prevail on ineffectiveness claim, they must show that the attorney both failed to raise the issue *and then demonstrate actual prejudice.* In re Pers. Restraint of Lord, 123 Wn.2d 296, 313-314 (1994). The most logical reason the appellate counsel did not raise the issue is that it's frivolous, because the Defendant proposed the instruction given, but also because the instruction went beyond what was required.

The Supreme Court has held that to be armed, a weapon must be readily accessible, and there must be a "connection between the defendant, the weapon, and the crime." State v. Schelin, 147 Wn.2d 562, 567, 55 P.3d 632 (2002), *citing to* State v. Barnes, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005); State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993).

The connection between them is not an essential element, but merely defines the "armed with" factor.

> We have concluded that the connection between the weapon, the defendant, and the crime is definitional, not an essential element of the crime. E.g. Barnes, 153 Wn.2d at 383; State v. Gurske, 155 Wn.2d 134, 138-39, 118 P.3d 333 (2005). Instead, the connection is merely a component of what the State must prove to establish that a particular defendant was armed while committing a particular crime.

-(State v. Easterlin, 159 Wn.2d 203, 206 (Wash. 2006)).

Here, the connection between the crimes and the firearm go far beyond the obvious. Defendant loaded the firearm, aimed it at officers, crawled out of the house with the loaded rifle, and panned around in a hunting manner searching for officers near his truck. When he didn't find them he got in his truck and drove towards the officers by plowing through his front yard, forcing the officers to run. As they got clear, he changed directions, knocking down a fence. During a pursuit by other officers, he raised the rifle up to show an officer he was armed. He then accelerated away from the officers and rammed Sgt. Crawford with his truck, with the rifle still with him. He was ordered out of the truck but tried to get back into it where the rifle was at. All of this occurred over the course of a very short period of time. To argue that he was not armed with the rifle is baseless.

2. Any Allegation that the Jury Misunderstood the instruction can not be considered.

The defendant attempts to assert that a juror misunderstood the WPIC 2.07.02 as a basis for overturning the verdict. The only evidence that is submitted is a hearsay statement from the trial attorney that at some point after the trial he spoke to one juror who said she didn't understand it.

In Re Rice, 118 Wn.2d 876, supra, requires the defendant to provide actual, *admissible proof* that of a fact before the court may consider it via a PRP. In this case, the affidavit by the defense attorney is blatant hearsay, which is both inadmissible and insufficient to support such proof.

> If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.

In re Rice, 118 Wn.2d 876, 886 (Wash. 1992).

The only evidence that the defendant presents that the jury misunderstood was contained within the declaration of Tom Phelan, but there is no support for this from the juror herself. As such, it is inadmissible hearsay, which doesn't meet the proof standards necessary under Rice, supra.

E. Aggravating Factors related to an exceptional sentence.

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 72 U.S.L.W. 4546 (2004) and in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) affected the way exceptional

sentences were handled in Washington by holding that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Blakely, 124 S. Ct. at 2536.

In response, the legislature amended the procedure to require that a jury make the determination that facts have been proven to support an exceptional sentence. The Legislature codified new procedures to require a jury to make such a finding and codified existing exceptional sentence factors. The procedures and retro-active application of the procedure are constitutional. State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007). See also State v. Eggleston, 164 Wn.2d 61, 187 P.3d 233 (2008).

Defendant indicates the Legislative response violates the *ex post facto* provisions of the US Constitution, but presents no argument in this regard. Nevertheless, he is wrong.

The test to determine whether a law violates the ex post facto clause is whether the law "'(1) is substantive, [or] merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it.'" State v. Ward, 123 Wn.2d 488, 498, 869 P.2d 1062 (1994) (*quoting* In re Personal Restraint of Powell, 117 Wn.2d 175, 185, 814 P.2d 635 (1991)). "In the context of an act already criminally punished or punishable, "disadvantage" means

the statute alters the standard of punishment which existed under the prior law." Schmidt, 143 Wn.2d at 673.

The United States Supreme Court has held, under virtually identical circumstances, that retroactive application of a procedural change in a sentencing statute (made to cure constitutional defects) did not violate the ex post facto clause. In Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), the defendant, charged with two murders, claimed that changes in Florida's death penalty statutes violated the ex post facto clause. After the murders, the Florida Supreme Court struck down Florida's death penalty statutes as unconstitutional. By the time of the defendant's trial, however, the Florida Legislature had enacted a new death penalty procedure. Among the changes to the law was the role of the jury; under the previous law, a death sentence was imposed unless a majority of the jury recommended leniency. Under the new law, a jury rendered a non-binding advisory decision whether to impose a death sentence. Considering these changes, the Court had little difficulty rejecting the ex post facto claim:

> It is equally well settled, however, that "(t)he inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed." Gibson v. Mississippi, 162 U.S. 565, 590, 16 S.Ct. 904, 910, 40 L.Ed. 1075 (1896). "(T)he constitutional provision was intended to secure substantial personal rights against arbitrary and

> oppressive legislation, *see* Malloy v. South Carolina, 237 U.S. 180, 183, 35 S.Ct. 507, 59 L.Ed. 905, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." Beazell v. Ohio, supra, at 171, 46 S.Ct., at 69.
>
> Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto....
>
> In the case at hand, the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed..

Dobbert v. Florida, 432 U.S. 282, 293-94, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

The Court also rejected the defendant's claim that since the law was subsequently found to be unconstitutional, there was no law in effect at the time he committed his murders.

> [T]his sophistic argument mocks the substance of the Ex Post Facto Clause. Whether or not the old statute would in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder.
> ...
> Here the existence of the statute served as an "operative fact" to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder. This was sufficient compliance with the ex post facto provision of the United States Constitution.

Dobbert v. Florida, 432 U.S. 282, 297-98, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

Defendant argues that he was not warned of the potential for an exceptional sentence, yet clearly, there existed a statute on the books providing for an exceptional sentence prior to the commission of his crime. He objects to lack of warning of the potential for an enhancement, but like Dobbert, he was on notice by the statute and case law regarding potential penalties for committing crimes against police officers in the performance of their duties.

The exceptional sentence factor to which defendant was found guilty is that involving an assault on an officer knowing the officer was performing his official duties.[19] This factor was recognized in State v. Kidd, 57 Wn. App. 95, 786 P.2d 847 (1990) and affirmed and incorporated into Washington's common law. State v. Anderson, 72 Wn. App. 453; 864 P.2d 1001(1994). State v. Ramiriez, 109 Wn. App. 749, 37 P.3d 343 (2002). This common law factor was codified into RCW 9.94A.535 by the 2005 Legislature.

As to notice and the balance of arguments raised by the defendant, the validity of the procedural amendments and the codification of the common law factors was recently upheld in State v. Hylton, 154 Wn. App.

[19] Defendant mis-identifies the exceptional sentence factor as "egregious lack of remorse" in the petitioners brief at pp 43-4.

945, 226 P.3d 246 (Div II - 2010). There, the court affirmatively rejected each of the arguments put forth by the defendant. Defendant is therefore not entitled to relief.

DATED this 7 day of October, 2010

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By: _____

JAMES E. DAVID, WSBA#13754
Senior Deputy Prosecuting Attorney

APPENDIX A

Supplemental transcript

No. 40553-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. ROBIN T. SCHREIBER, Defendant.	Superior Court Case No: 04-1-01663-1 REPORT OF PROCEEDINGS (SUPPLEMENTAL EXCERPT)

No. 40553-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	Superior Court Case No:
	)	04-1-01663-1
Plaintiff,	)	
	)	
v.	)	
	)	
ROBIN T. SCHREIBER,	)	
	)	
Defendant.	)	
	)	

CD PROCEEDINGS

Dates and **times** requested for transcription:

May 22, 2006 – 10:26:00 to 10:30:30

HEARD BEFORE THE HONORABLE:

Robert L. Harris

TRIAL COUNSEL FOR THE PLAINTIFF:

Gene Pearce and James David

TRIAL COUNSEL FOR THE DEFENDANT:

Tom Phelan

Also needed for transcription is a copy of the clerk's minutes, mainly for spellings of witness' names, etc, if not on CD

Evelyn M. Pierce, 5404 N.E. 121st Ave., #69, Vancouver, WA 98682
Telephone: 360-944-0449
Fax: 360-944-0830 EVIEMPIERCE@HEI.NET

May 22, 2006, beginning at 10:20:00:

Judge: Preliminarily Mr. Phelan, I'm denying the motion. It can be renewed at that - we - we have a detailed questionnaire that you're proposing. Obviously we - the tender of the questionnaire is - that we - that it looks like it's impossible to find a reasonable jury. As they say we're now in excess of - I think the Federal Census claims there are four hundred and eleven thousand. Obviously there's the kind of people that moved into the county over the past year. We have been able to secure juries but it is a motion that if made, we may have to bring in a alternate jury. That is a matter in which - we'll have to take up if we cannot appropriately get one. I will make some effort to put some standby situation in a - in order at Cowlitz County.

JD: For importing a jury?

Judge: For importing. I - I would not move it because we have so many witnesses and so many - we're - we're - it's easily a hour bus ride. It may cut out hours down - maybe we start at ten or nine thirty rather than - I would have to break at four thirty if we have to import. I mean there's issues in that.

JD: Yeah.

Judge: Hum? But -

JD: I think -

Judge: - preliminarily I - I believe that we

should be able to secure a jury here in Clark County.

JD: - just to be clear -

Judge: - hum?

JD: - sorry Judge to interrupt you. But be aware that I think the Taco Bell issue extended to Cow-co (ph) as well.

Judge: As where?

JD: Extended to Cowlitz County as well.

Judge: Now I'm not sure of that -

JD: I - I'm not certain but I thought that's what I heard.

TP: I'm not sure either Judge. My understanding is -

Judge: - probably have less of an impact. We then have - probably a question that we'll need to resolve prior to jury selection is who might - people who have bought a badge making annoying contribution - whether they can continue to serve.

TP: Do you want to be heard on that now?

Judge: I - I think perhaps you may want to brief that.

TP: Okay.

Judge: I assume you would feel they were disqualified and -

TP: Yes.

JD: He would. I don't know that we would.

Judge: I assume there may be - I - I have - it's one of these things I have not - I don't - I've never seen any legal authority in this particular area.

JD: Yeah. See Ta - Taco Bell does these fund raising events. It's not just local.

Judge: I know but these specifically quote - you know - the badge of honor.

JD: They do the badge. They also do the boot - the firefighter's boot. They do one -

Judge: That - that's general. This is specific.

JD: - yeah, I understand. But I'm just getting at - this - this sort of thing -

Judge: So I -

JD: - it's so generic at Taco Bell - that's another issue I think.

Judge: - I don't - as I say we'll - we'll resolve it before we start jury selection obviously. And

TP: Well Judge - I mean I can tell you right now that I'll - I don't know that there's any case law and it's like - the question is if they contributed to that - to me it's - it's patently obvious that they can't set - set aside their impartiality - or set aside their partiality and be impartial in this case.

Judge: I understand. There - there's - it's a

significant issue.

TP: Yeah.

Judge: I'm not discounting it.

TP: Yeah. I don't think I should have to burn on my preemptories to -

Judge: Hum?

TP: - I don't think I should have to use the Defendant's preemptories to get rid of people that - that show that type of partiality.

Judge: I - I need to see the authority, if any.

TP: Well if I don't have any, you've just heard it.

Judge: Well as I say, it's a very unique - when I first saw it I thought oh boy! I was thinking that we were so far away that the publicity and everything else would have gone - gone and gone and I thought oh boy, we don't need this but - in the same way, no one's going to interfere with any type of effort such as this on behalf of any individual. Okay?

JD: Judge could we take a short recess?

Judge: Hum?

JD: Could we take a short recess and maybe have a little -

Judge: Sure.

JD: - have a short chat in chambers for a

minute?

Judge: It's what?

JD: Can we have a short chat in chambers for a minute?

Judge: Sure.

Recess.

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C E R T I F I C A T E

I, Evelyn M. Pierce, certify that the **supplemental** excerpted portion of the trial of *State of Washington v. Robin T. Schreiber* occurred at the time and place set forth and that at said time and place the **supplemental** excerpted portion of that trial was recorded on a CD. That I subsequently transcribed the entire recorded excerpted portion of that trial to the best of my ability as accurately as possible.

October 5, 2010.

_____

Evelyn M. Pierce

Court Certified transcriptionist

APPENDIX B

Declaration of Robert Harris

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Plaintiff, v. ROBIN TAYLOR SCHREIBER, Defendant.	Declaration of Robert Harris, Clark County Superior Court Judge No. 40553-9-II

STATE OF WASHINGTON)
: ss
COUNTY OF CLARK)

I, Robert L. Harris, hereby declare that:

I am presently retired as the Senior Judge of the Clark County Superior Court. I was a Superior Court Judge from September 1979 until December 31, 2009. I presided over criminal and civil trials throughout my career. I was the judge assigned to handle the matter of State v. Robin Taylor Schreiber, in Clark County Cause Number 04-1-01663-1. I presided over the trial and maintained all responsibility for the case after the case was assigned to me in 2004.

Juror Questionnaires

During various hearings, the defense attorney, Thomas Phelan, proposed the use of written juror questionnaires. The State opposed the use of the questionnaires. Nevertheless, I directed that Mr. Phelan should draft a questionnaire and forward a copy to the Deputy Prosecuting Attorneys handling the case, including James David and Gene Pearce. Mr. Phelan completed drafts and sent them via email to Mr. David. Mr. David was asked to indicate

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questions he objected to and suggestions and email them to me. Mr. David complied with the request, indicated his concerns and emailed them to the court. Mr. Phelan's questionnaire and Mr. David's objections are attached to the Personal Restraint Petition. Mr. Phelan's questionnaire included language that the answers were sealed and confidential.

I agreed to allow Mr. Phelan's questionnaire, with some modifications, to be given to the jury. I prepared the modified questionnaire using Mr. Phelans proposal as a template.

On May 31, 2006, we used the largest courtroom in Clark County. The jurors were brought into the courtroom, told about the questionnaire and directed to complete them. The jurors completed the questionnaires. Copies were made and provided to the prosecutor and defense attorneys for their use. After the trial was over, I directed that copies of the juror questionnaires be retained by the Clark County Clerk.

At no time has there been an order sealing the questionnaires. They are not presently, nor have they ever been subject to an order sealing them. Rather, juror information is subject to GR 31(j) which provides that their information is presumed private, but that any person, party, attorney or member of the public may petition the court for access to them. I have not had any person, party or member of the public petition for access to these records until asked about them by Mr. David of the Prosecuting Attorneys office in September 2010. I inquired of the Clark County Clerk and confirmed they still have the questionnaires for the jurors.

Juror Inquiry

During the voir dire process, I was advised that there was a possibility that jurors may have seen the defendant in handcuffs during a break. I was concerned about possible juror contamination. I recall that defense counsel was aware of the issue, but that the prosecutor was not.

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I asked the attorneys to step into my office to discuss the possible jury pool contamination and to briefly interview the two jurors about whether they saw the Defendant in handcuffs. I asked Mr. Phelan if he and Mr. Schreiber agreed. I also asked if Mr. Schreiber agreed to waive his presence. Mr. Phelan confirmed that Mr. Schreiber waived his presence while I queried the jurors about the matter.

The sole purpose in bringing the jurors into my office was to inquire about jury contamination. It was not for the purpose of voir dire. I did this in order to ensure control over my court and to ensure a fair trial for Mr. Schreiber.

We left the courtroom for a very short time. I had my Judicial Assistant bring in the two jurors in question, one by one, and asked them if they saw anything in the hallway during the break. The first juror told me she had seen nothing unusual. The second juror indicated that she had seen the defendant in handcuffs in the hallway. I asked the attorneys if they had any questions about what was observed. The prosecutor indicated he had no questions. The defense attorney, Mr. Phelan, went beyond the limited scope of the inquiry. He asked the juror a question or two about whether she had seen the press coverage about the incident. She replied that she had. That juror was excused at the defense's request due to the contamination issue.

Courtroom Size

As indicated previously, we began voir dire in the largest courtroom in Clark County. The voir dire was open to the public. We started the process by bringing in jurors into the courtroom and asking them to fill the rows. They did not fill the courtroom leaving members of the public room to sit in through the proceedings. There were empty rows in the front and back of the courtroom.

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Some members of the public remained throughout jury selection. Some members of the public would enter, watch for a time and then leave. The open rows are somewhat difficult to see, but are visible on the video recordings taken by the court's video recording system.

After completing the questionnaires, the jurors were brought into the courtroom individually to discuss hardships. We spent several hours conducting individual voir dire.

Later in the trial, we moved back to my own courtroom. Once in my courtroom we conducted voir dire of jurors in groups. Throughout voir dire in my courtroom, members of the public were always present. I don't believe there was ever a time when members of the public were not present during voir dire or where we ran out of room for additional members of the public to attend.

Sleeping

Mr. Schreiber indicates that he believed that I was sleeping during a portion of the trial. He does not indicate when this occurred, nor does he indicate that there were any rulings, or other errors that were committed during the time that he claims I was sleeping. I was not in fact sleeping or dozing during the trial.

After 30+ years on the bench, I have learned that I must listen to the evidence and concentrate on it. I will occasionally close my eyes to concentrate on what is being said, but this is not sleeping. I have also found that looking away from jurors is an appropriate way to avoid displaying the natural reactions that any person may have to certain items of evidence. During these times, I have also closed my eyes or looked away to concentrate on the evidence and avoid influencing the jury.

I believe that it is possible that Mr. Schreiber may have mis-interpreted my actions, but I was never sleeping or dozing during the trial.

CLARK COUNTY PROSECUTING ATTORNEY
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Juror Sleeping

Mr. Schreiber alleges that a juror was sleeping during trial. At no point did I observe any juror sleeping or dozing during the trial. Furthermore, no one brought the issue before the court during the trial. Had they done so, I could have addressed the issue at the time.

CERTIFICATION: I declare and certify under penalty of perjury under the laws of the State of Washington that the preceding is true and correct to the best of my knowledge.

Executed in the City of Vancouver, Washington, this 6th day of October, 2010.

Robert L. Harris
Clark County Superior Court Judge (Retired)

CLARK COUNTY PROSECUTING ATTORNEY
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APPENDIX C

Excerpt- June 1, 2006

No. 40553-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. ROBIN T. SCHREIBER, Defendant.	Superior Court Case No: 04-1-01663-1 REPORT OF PROCEEDINGS (EXCERPT)

No. 40553-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. ROBIN T. SCHREIBER, Defendant.	)	Superior Court Case No: 04-1-01663-1 REPORT OF PROCEEDINGS

CD PROCEEDINGS

Dates and **times** requested for transcription:

Trial, June 1, 2006 – 13:44:18 to 13:55:12

HEARD BEFORE THE HONORABLE:

Robert L. Harris

COUNSEL FOR THE PLAINTIFF:

Gene Pearce and James David

COUNSEL FOR THE DEFENDANT:

Tom Phelan

Also needed for transcription is a copy of the clerk's minutes, mainly for spellings of witness' names, etc, if not on CD

Evelyn M. Pierce, 5404 N.E. 121st Ave., #69, Vancouver, WA 98682
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June 1, 2006 beginning at 13:44:18:

Judge: Okay. Mr. Alford is excused. We'll move Mr. Huggins up one seat. Ms. Kenyon up one seat. Mr. Compton up one seat and then seat Mr. Frazier.

Clerk: Okay. Call the jurors that's in the other room - is in the hallway - when the Defendant was transported so -

Judge: Who was that?

Clerk: - we're in the process of finding out.

Judge: Was that one of the [inaudible]?

Clerk: A yellow top on and -

Judge: Huh?

Clerk: - I don't know - she went in the woman's restroom. I'll get her name. If you want to -

Female: They're together. Jeri Raimer and Patricia Rea. And I instructed them -

Judge: Okay.

Female: Two of them came out of the restroom. Jeri Raimer and Patricia Rea. I don't -

Clerk: While the Defendant was in the hallway.

Female: She was - she was wearing the yellow. I don't know that -

Clerk: So she talked to the other one?

Female: - and I instructed them both - they're not to be leaving the jury room.

Judge: Okay. Where are they now?

Female: Back in the jury room - down the hall. Do you want to pull them out?

Judge: Yeah. Bring - bring this group in and then we'll deal with the other two.

Female: Okay. So you want to bring this group in and what do you want me to do with the other two?

Judge: And have the other two go back there -

Female: Okay.

Judge: - keep those in there and bring the two that we're talking about -

Female: Separate them - yeah.

TP: So what are we doing Judge?

Judge: Hum?

TP: So what are we doing?

Judge: We'll be there in a minute.

Female: And you did not want any of the other ones out of there brought into the courtroom, correct?

Judge: Yeah. That's right. We have a couple wanderers. We're going to be talking to a couple jurors in my chambers.

TP: I - I caught it out of the corner of my -

Judge: - waive your client's presence?

TP: Yeah.

Judge: Or not?

TP: Yes.

Judge: Okay. And what we're talking about I prefer not to be there but that's -

TP: No that's - that's fine.

Female: Move on in and scoot up one chair. Okay?

Jurors enter the courtroom.

Judge: Mr. Frazier? Come forward please. Get a seat - sit next to Mr. Compton. Okay. We'll be a minute. We have to talk to a couple other respective jurors in cham - in chambers. We'll be with you in a minute.

Attorneys and Judge leave the courtroom for chambers.

Male: I think the Judge wants Ms. Raimer and Ms. Rea in here. And do you want them one at a time?

Judge: One at a time.

TP: You have the record on?

Clerk: Which - yes. Which one do you want first? Do you care?

Judge: Either. Apparently as I understand one was sort of out in the hall, one was coming out of the women's restroom and they've seen the Defendant leaving in shackles.

TP: Um-hum. What I understand, both of them did. I -

Judge: I don't know. I'm -

Male: Hi there.

Male: Hi.

Judge: Have a chair. Okay. For the record, can you state your name?

JR: Jeri Kay Raimer.

Judge: As I understand before you were coming in and you may have been just briefly out in the hall area leaving the lady's restroom?

JR: Um-hum.

Judge: Now these are people who observed the Defendant?

JR: Nothing.

Judge: Did you see the Defendant?

JR: No, huh-uh. No. Huh-uh.

Judge: All right. You didn't see any custody officer or any people you know out in the hallway?

JR: Huh-uh. No custody officer.

Judge: Nobody known to you?

JR: Just the gal that followed me in there from the jury room.

Judge: Okay.

TP: I don't have any questions. Thank you.

Judge: Mr. David?

JD: Nothing.

Judge: Okay. You can go back.

JR: I'm sorry. I -

Judge: No problem. It's just -

JR: - okay.

Judge: - that's very much.

JR: - thank you.

TP: I think she - I'm just saying I think she probably didn't see anybody because I was coming out of the men's room when she was going to the ladies room and I don't think Mr. Schreiber was either her or he had already been brought by - so -

Clerk: This is Patricia.

TP: Hi.

JD: Hi there.

Judge: Have a chair.

PR: Yes.

Judge: Okay. Your name please?

JR: Patricia A. Rea.

Judge: And my understanding is you were in the second group coming in at 1:30?

JR: Correct.

Judge: And you may have been out in the hall area recently - not in the jury room?

JR: Well I was told we could go to the restroom - I and several other people have gone but I would never narc on the people that went ahead of me. So if you expect me to, forget it.

Judge: Okay.

JR: There were at least six others.

Judge: Did you observe the Defendant -

JR: Yes I did.

Judge: - okay. And how was he attired at that time?

JR: He was attired in normal street clothes except he had these pretty bracelets on that were probably silver.

Judge: Okay.

JR: I've seen that before.

Judge: Okay. And did you observe anything insofar as being cuffs being removed?

JR: In what?

Judge: Did you -

JR: I'm sorry. I didn't understand your question.

Judge: - did you - did you see the cuffs being removed?

JR: I did not see anything other than being told to move over and I moved to the wrong direction. Because I'm directionally challenged sometimes and then I was told to move the other way which I did and that was it.

Judge: Okay.

JR: I saw nothing more than him in handcuffs.

Judge: Okay. Mr. David?

JR: And then I realized oh, oh, that's why I shouldn't be right there.

JD: Mr. Phelan?

TP: Ms. Rea I think that - I read your questionnaire. I think you also said that you saw this coverage of this some time ago, am I correct?

JR: I saw news coverage of this when it occurred whenever that was, yeah. It was pretty hard not to see it - I would say that most people probably did. But I don't know that for a fact. I just know I did.

TP: Okay.

JR: And I know that I saw it on the day that I got up, picked up my newspaper and I said oh, I bet this is what I'm going for. But I read it only - let's see - I'm being honest and up front. And there was an article in today's paper which I very dutifully did not read.

TP: Did you, as a result of your previous exposure to the story of this particular case revised opinion of the facts of the case, no?

JR: I -

TP: The news or anything else?

JR: - just the fact that there was an accident and that he ran into a cop - or a policeman and he was killed - the policeman - and that there seemed to be something

deliberate on the part of the person who was the perpetrator. Your client. But - you know? I don't form judgments. I just know what is said in the paper.

TP: All right. No questions.

Judge: Okay. Thank you. You can go back.

JR: Okay.

Judge: Counsel?

TP: I'm going to ask you to excuse her. I think based on the pre-trial publicity as well as just seeing the Defendant in cuffs.

Judge: Okay.

JD: It's an issue we can void [inaudible].

Judge: Hum?

JD: We can void the issue on appeal by -

Judge: Yeah. Okay. She'll be excused. The other one I see no problem?

TP: Yeah, I didn't hear her say anything that led me to believe she saw Mr. Schreiber cuffed. Judge the other issue and I just encountered this and I think Mr. David and I may have encountered too - are the jurors forced to use the same restroom as we are?

Judge: Excuse me?

TP: Are the jurors using the same restrooms we are?

Judge: They're not supposed to.

TP: Yeah. Cause I - I've gone in there and saw them - so when do we suit them up with the buttons? Because I'm real worried that there's going to be somebody just says something to these people and -

Judge: This group just got here and, of course, getting them assembled and -

TP: - right.

Judge: - this group should be over here.

TP: Okay.

TP: Well I'm just wondering -

JD: They were - the door would be shut.

TP: - yeah, I know. But I've gone into the bathroom and there have been jurors in there and I - it's really uncomfortable for me and - and maybe I should just go downstairs - I don't know. But I just am worried that we're going to say something and not know somebody's in the stall. So -

Judge: Okay.

Attorneys and Judge return to the courtroom.

Clerk: All rise please.

Judge: Please be seated. For the record, we've already made that, okay? Mr. Huggins, you yesterday indicated you had some physical discomfort and it was part of the problem you were seeking to be excused. How - how's the circumstances now?

Juror: It's about the same. It's - I can certainly function.

Judge: Now you've had the experience now of sitting sort of for several hours - kind of - as we're going through jury selection. Do you feel that you would be able to physically be attentive and listen to things and not have problems?

Juror: Yeah.

Judge: How's the work issues that you have?

Juror: I do get paid. I don't know if there's an extent - like when you're saying two weeks or something like that. I talked to them yesterday - they were doing to research it and then I thought today's proceedings would be a little bit shorter and I would contact them today after I found out. So they - they're there until - I do get paid.

Judge: Okay.

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C E R T I F I C A T E

I, Evelyn M. Pierce, certify that the excerpted portion of the trial of *State of Washington v. Robin T. Schreiber* occurred at the time and place set forth and that at said time and place the excerpted portion of that trial was recorded on a CD. That I subsequently transcribed the entire recorded excerpted portion of that trial to the best of my ability as accurately as possible.

September 24, 2010.

_____

Evelyn M. Pierce

Court Certified transcriptionist

APPENDIX D

Declaration of Jennifer Casey

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Plaintiff, v. ROBIN TAYLOR SCHREIBER, Defendant.	Declaration of Jennifer Casey, No. 40553-9-II

STATE OF WASHINGTON)
: ss
COUNTY OF CLARK)

I, Jennifer Casey, hereby declare that:

I am a Legal Secretary with the Clark County Prosecuting Attorneys' Office. I have assisted with the typing of the Brief of Respondent and have gathered the various exhibits and attachments for the response. In the process, I was asked to review the video record and determine the length of certain matters.

I reviewed the video recordings from the trial of State v. Schreiber for June 1, 2009. I noted that the vide recordings have a timer on them. I listened to the recordings and noted that the questioning of the first juror by the court in chambers took 44 seconds.

Questioning by the court of the second juror took a 1 minute 28 seconds. After the court concluded it's questions, defense counsel spoke to the juror until the juror was excused 1 minute 42 seconds later.

CERTIFICATION: I declare and certify under penalty of perjury under the laws of the State of Washington that the preceding is true and correct to the best of my knowledge.

Executed in the City of Vancouver, Washington, this 7 day of October, 2010.

Jennifer Casey

CLARK COUNTY PROSECUTING ATTORNEY
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APPENDIX E

Video 9:40-9:45

INSTRUCTION NO. 33

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime of Murder in the First Degree, or any lesser crime that you receive instructions regarding, including Murder in the Second Degree, Manslaughter in the First Degree or Manslaughter in the Second Degree.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of firearm, and the circumstances under which the firearm was found.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 41

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime of Murder in the First Degree, or any lesser crime that you receive instructions regarding, including Murder in the Second Degree, Manslaughter in the First Degree or Manslaughter in the Second Degree.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of firearm, and the circumstances under which the firearm was found.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

WPIC 2.10.01

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBIN TAYLOR SCHREIBER, Appellant.	Case No. 40553-9-II Clark Co. No. 04-1-01663-1 DECLARATION OF TRANSMISSION BY MAILING AND FACSIMILE

STATE OF WASHINGTON)
: ss
COUNTY OF CLARK)

On October 7, 2010, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached

TO:		
	David Ponzoha, Clerk Court Of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	Jeffrey E. Ellis Attorney at Law 405 Second Avenue, Ste. 401 Seattle WA 98104

DOCUMENT: Response to Personal Restraint Petition

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Jennifer L. Jackson

Date: 10/7, 2010.
Place: Vancouver, Washington.